

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Service Rules for the 698-746, 747-762 and	)	WT Docket No. 06-150
777-792 MHz Bands	)	
	)	
Revision of the Commission's Rules to Ensure	)	CC Docket No. 94-102
Compatibility with Enhanced 911 Emergency	)	
Calling Systems	)	
	)	
Section 68.4(a) of the Commission's Rules	)	WT Docket No. 01-309
Governing Hearing-Aid Compatible Telephones	)	
To: The Commission		

**COMMENTS OF  
COUNCIL TREE COMMUNICATIONS, INC.**

Steve C. Hillard  
George T. Laub  
Jonathan B. Glass  
Council Tree Communications, Inc.  
2919 17th Avenue  
Suite 205  
Longmont, CO 80503  
(303) 678-1844

September 29, 2006

## **TABLE OF CONTENTS**

	<b><u>Page</u></b>
SUMMARY.....	ii
I. INTRODUCTION .....	2
II. CURRENT CONDITIONS THREATEN TO LEAVE DESIGNATED ENTITIES OUT OF THE OPPORTUNITY TO BECOME 700 MHz BAND LICENSEES .....	4
III. THE COMMISSION SHOULD LIMIT ELIGIBILITY TO BID FOR LICENSES IN CERTAIN 700 MHz BAND BLOCKS TO SMALL OR VERY SMALL BUSINESSES .....	11
IV. IN THE ALTERNATIVE, THE COMMISSION SHOULD OFFER A 35 PERCENT BIDDING CREDIT TO QUALIFYING APPLICANTS BIDDING FOR LICENSES IN ANY 700 MHz BAND BLOCK .....	13
V. CONCLUSION .....	16

## **SUMMARY**

The 700 MHz Band spectrum rights to be auctioned under the Digital Television and Public Safety Act of 2005 will be central to the future of wireless broadband offerings in the United States. Yet, current conditions threaten to leave designated entities out of this vital licensing opportunity. The seeds of these conditions lie in part in the sharply-eroded advantages available to designated entities in competitive bidding since 1995.

Most recently, Commission rules adopted just in advance of the auction of advanced wireless services licenses (“Auction 66”) did grave damage to the ability of designated entities to succeed. Designated entities had won an average of 74 percent of licenses by value in the six major commercial mobile radio service license auctions in which designated entity preferences were offered in the past ten years. In Auction 66, however, designated entities won just *4 percent* of licenses by value.

To work to avoid a similar result — or even worse — with respect to 700 MHz Band licenses, the Commission should limit eligibility to bid for licenses in Lower 700 MHz Band block B and Upper 700 MHz Band block C to those that qualify as small or very small businesses under the Commission’s Rules. In the alternative, the Commission should offer a 35 percent bidding credit to applicants that qualify under Section 1.2110(f)(2)(i) of the Commission’s Rules bidding for licenses in any 700 MHz Band block. Under the conditions currently affecting the designated entity program, providing these additional incentives is essential to help give effect to the intent of Congress.

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Service Rules for the 698-746, 747-762 and	)	WT Docket No. 06-150
777-792 MHz Bands	)	
	)	
Revision of the Commission's Rules to Ensure	)	CC Docket No. 94-102
Compatibility with Enhanced 911 Emergency	)	
Calling Systems	)	
	)	
Section 68.4(a) of the Commission's Rules	)	WT Docket No. 01-309
Governing Hearing-Aid Compatible Telephones	)	
To: The Commission		

**COMMENTS OF  
COUNCIL TREE COMMUNICATIONS, INC.**

Council Tree Communications, Inc. ("Council Tree"), pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, submits these comments in response to the captioned *Notice of Proposed Rule Making, Fourth Further Notice of Proposed Rule Making, and Second Further Notice of Proposed Rule Making* (FCC 06-114) adopted by the Commission on August 3, 2006 and released on August 10, 2006 ("*NPRM*").<sup>1/</sup>

---

<sup>1/</sup> A summary of the *NPRM* was published in the Federal Register on August 21, 2006. See 71 Fed. Reg. 48,506 (Aug. 21, 2006). In an *Order* released on September 15, 2006, the Wireless Telecommunications Bureau extended the period for comments in response to the *NPRM* to September 29, 2006. See *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, Order*, DA 06-1880, ¶ 4 (Wir. Tel. Bur. rel. Sept. 15, 2006).

## **I. INTRODUCTION**

Council Tree is an investment company organized to identify and develop communications industry investment opportunities for the benefit of businesses owned by members of minority groups and women. As part of this work, Council Tree has long been an active supporter of responsibly-managed government efforts to encourage the participation of new entrants in the communications industry. In 2003, Council Tree president Steve C. Hillard was appointed to the Commission's Advisory Committee on Diversity for Communications in the Digital Age, and he serves as chairman of the Committee's Transactional Transparency & Related Outreach subcommittee.

In the competitive bidding context, the Commission is directed under Section 309(j) of the Communications Act to promote "economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women,"<sup>2/</sup> and to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to

---

<sup>2/</sup> 47 U.S.C. § 309(j)(3)(B).

participate in the provision of spectrum-based services . . . .”<sup>3/</sup> Given its investment mission, Council Tree has an interest in seeing that the Commission’s spectrum auction rules and policies reflect these mandates, making room for those who could otherwise be excluded under a system of competitive bidding.

Licenses in the 700 MHz Band offer a unique and critical entry point into the wireless industry for designated entities and new entrants. In contrast to cellular and broadband personal communications service (“PCS”) spectrum, 700 MHz Band spectrum has superior propagation characteristics, permitting economic wireless coverage in sparsely covered rural areas and more effective in-building penetration in urban areas.

As a result, the 700 MHz Band spectrum rights to be auction under the Digital Television and Public Safety Act of 2005 (“DTV Act”)<sup>4/</sup> will be central to the future of wireless broadband offerings in the United States. In turn, the opportunity to acquire 700 MHz Band licenses is a once-in-a-decade chance for designated entities and new entrants to acquire meaningful spectrum positions with which to provide highly competitive state-of-the-art broadband wireless services.

---

<sup>3/</sup> *Id.*, § 309(j)(4)(D). The Commission is also tasked to identify and eliminate regulatory barriers facing small businesses in the ownership of telecommunications facilities and provision of services. *Id.*, § 257.

<sup>4/</sup> *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4, 22 (2006).

## **II. CURRENT CONDITIONS THREATEN TO LEAVE DESIGNATED ENTITIES OUT OF THE OPPORTUNITY TO BECOME 700 MHz BAND LICENSEES**

Yet, current conditions threaten to leave designated entities out of the opportunity to become 700 MHz Band licensees. Since 1995, the number and quality of Commission incentives available to designated entities in competitive bidding have steadily eroded. Congress eliminated the availability of tax certificates for members of minority groups.<sup>5/</sup> For its part, the Commission has stopped setting aside licenses for bidding only by designated entities,<sup>6/</sup> has stopped offering the installment payment financing that so enhanced the ability of members of minority groups to acquire licenses in competitive bidding,<sup>7/</sup> and has stopped allowing smaller businesses to qualify for an auction with a reduced upfront payment.<sup>8/</sup> In addition, though it originally permitted designated entities to enter into management or joint marketing agreements with experienced firms without

---

<sup>5/</sup> See Self-Employed Health Insurance Act of 1995, Pub. L. No. 104-7, § 2, 109 Stat. 93 (1995) (eliminating the minority tax certificate program).

<sup>6/</sup> See, e.g., *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, Report and Order*, 18 FCC Rcd 25162, 25189-90 (2003) (resolving not to set aside any advanced wireless services licenses for bidding only by designated entities).

<sup>7/</sup> See, e.g., *Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 15293, 15322 (2000).

<sup>8/</sup> See, e.g., *Amendment of Parts 20 and 24 of the Commission's Rules — Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order*, 11 FCC Rcd 7824, 7859-60 (1996).

contravening the attribution thresholds in its entrepreneurs' block rules,<sup>9/</sup> the Commission *now* treats many management and joint marketing agreements as "attributable."<sup>10/</sup>

Most recently, new Commission rules did grave damage to the ability of designated entities to succeed. In its *Second Report and Order* in WT Docket No. 05-211, the Commission, *inter alia*:

- doubled the duration of its unjust enrichment schedule for licenses acquired with bidding credits from five years to ten years,<sup>11/</sup>
- instituted a new unjust enrichment provision requiring full repayment of any bidding credit in many cases where the construction requirements applicable at the end of the license term has not been met,<sup>12/</sup> and
- modified rules relating to spectrum leasing and resale arrangements to deprive designated entities of the value of their bidding credits if they

---

<sup>9/</sup> See *Implementation of Sections 3(n) and 332 of the Communications Act, Fourth Report and Order*, 9 FCC Rcd 7123, 7124 (1994) ("We expect that investor/manager agreements are one of the many alternatives available to designated entities . . . . This does not mean, however, that these management agreements will be deemed 'attributable' for purposes of the revenue thresholds in the entrepreneur's blocks"); *Implementation of Section 309(j) of the Communications Act — Competitive Bidding, Fifth Report and Order*, 9 FCC Rcd 5532, 5580, 5601 n.135 (1994) ("So long as the applicant remains under the *de jure* and *de facto* control of the control group, we shall not bar passive investors from entering into management agreements with applicants").

<sup>10/</sup> See 47 C.F.R. § 1.2110(c)(2)(ii)(H)-(I).

<sup>11/</sup> See *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, Second Report and Order and Second Further Notice of Proposed Rule Making*, 21 FCC Rcd 4753, 4766-67 (2006) ("*Second Report and Order*").

<sup>12/</sup> See *id.* at 4767.



lease, wholesale, or permit to be resold more than 25 percent of their “spectrum capacity” to any one party or more than 50 percent of their “spectrum capacity” in the aggregate.<sup>13/</sup>

The new rules apply to all designated entities alike, and the effect has been unmistakable.<sup>14/</sup>

The new rules were first announced when the *Second Report and Order* was released on April 25, 2006, and the Commission made clear that the rules would immediately apply to designated entities bidding in its auction of advanced wireless services licenses (“Auction 66”),<sup>15/</sup> which opened on August 9, 2006. As shown in Chart 1, designated entities had won an average of 74 percent of licenses by value (as a percentage of net winning bids) in the six major commercial mobile radio service (“CMRS”) license auctions in which designated entity preferences were offered during the past ten years. In Auction 66, however, designated entities won just 4 percent of licenses by value (as a percentage of net winning bids) — by far the

---

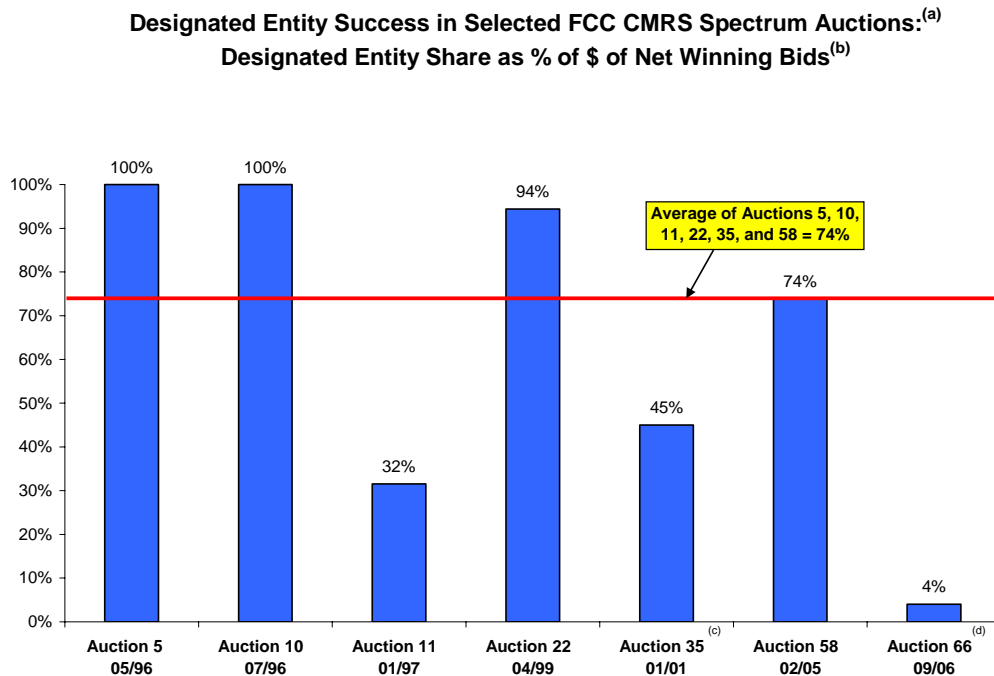
<sup>13/</sup> See *id.* at 4763-64.

<sup>14/</sup> Council Tree, Native Corporation, and the Minority Media and Telecommunications Council have filed a petition for review of the rules established or modified in the *Second Report and Order* (and in the *Order on Reconsideration of the Second Report and Order* in WT Docket No. 05-211 released by the Commission on June 2, 2006) with the United States Court of Appeals for the Third Circuit. In that proceeding, Council Tree, Bethel Native Corporation, and the Minority Media and Telecommunications Council are seeking the vacatur of the rules established or modified in the *Second Report and Order* (and in the *Order on Reconsideration of the Second Report and Order*) and the nullification of Auction 66.

<sup>15/</sup> See *Second Report and Order*, 21 FCC Rcd at 4771.

lowest of any major CMRS auction in which the Commission offered designated entity preferences.

**Chart 1**



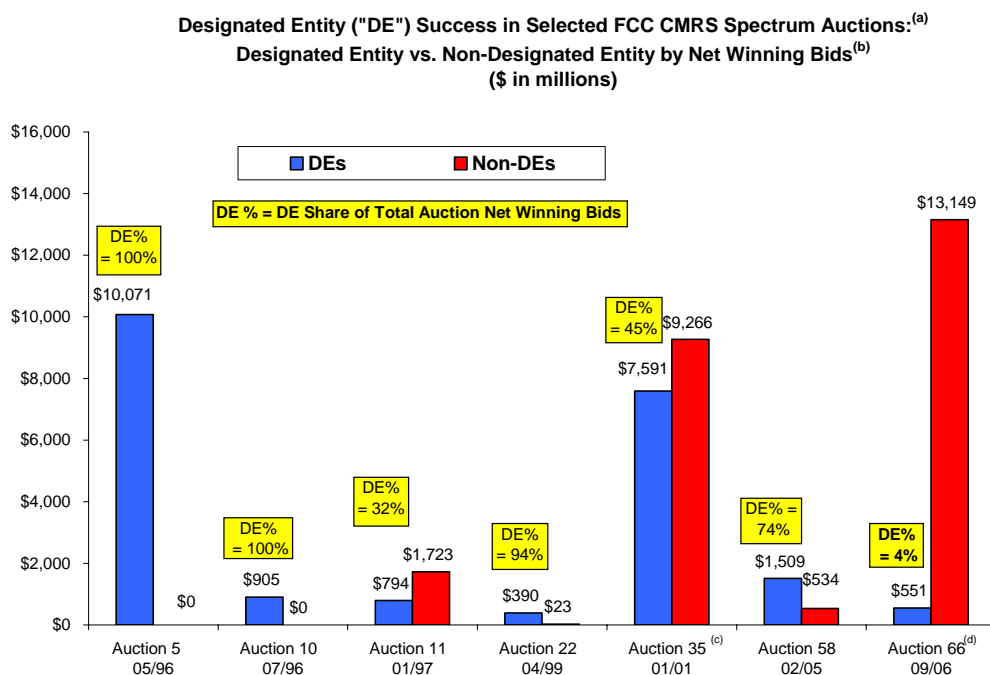
**Notes to Chart 1:**

- (a) Auctions 5 and 10 included only closed licenses (*i.e.*, bidding reserved for designated entities only). Auctions 11, 22, 35 and 58 included both closed and open licenses (with open licenses available both to designated entities and non-designated entities and designated entities receiving bidding credits). Auction 66 is the only one of these competitive bidding events to include open licenses only.
- (b) Net winning bid is the gross winning bid less the amount of any designated entity bidding credit.
- (c) Auction 35 results overturned in part as a result of a ruling by the United States Supreme Court.
- (d) Winning bids as of close of Auction 66.

Indeed, based on the percentage of net winnings bids, the designated entity share of Auction 66 winnings is closest to the 0 percent share in Auction 4 (broadband PCS), where no designated entity preferences were offered at all and no applicant identifying itself as a designated entity won a single license.

As illustrated in Chart 2, designated entities have historically been very substantial participants in major CMRS license auctions, underscoring the past effectiveness of the Commission's designated entity program.

**Chart 2**



**Notes to Chart 2:**

- (a) Auctions 5 and 10 included only closed licenses (*i.e.*, bidding reserved for designated entities only). Auctions 11, 22, 35 and 58 included both closed and open licenses (with open licenses available both to designated

entities and non-designated entities and designated entities receiving bidding credits). Auction 66 is the only one of these competitive bidding events to include open licenses only.

- (b) Net winning bid is the gross winning bid less the amount of any designated entity bidding credit.
- (c) Auction 35 results overturned in part as a result of a ruling by the United States Supreme Court.
- (d) Winning bids as of close of Auction 66.

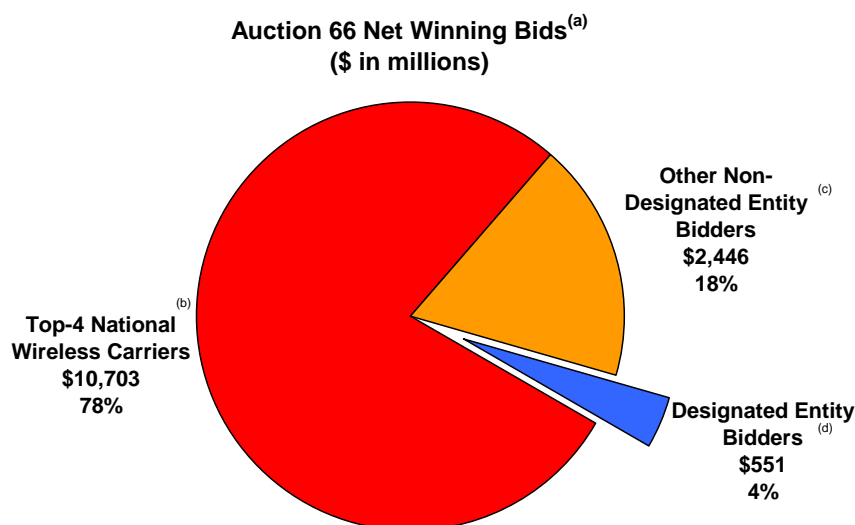
In the six major CMRS auctions prior to Auction 66, designated entities won a total of \$21.3 billion, demonstrating that designated entities had the capability of competing effectively for licenses offered by the Commission. In Auction 66, however, designated entities won just *\$551 million* of licenses by value (compared to the \$13.7 billion Auction 66 total), a result that pales in comparison to historical designated entity results in competitive bidding. In other words, in the single most important spectrum auction in this decade to date, competition from designated entities all but evaporated.

One consequence of this terrible reversal for designated entities is that the top four national wireless service providers dominated Auction 66. As Council Tree has shown, five national wireless service providers already had 90 percent of industry subscribers, 91 percent of industry spectrum (MHz-POPs), and 92 percent of industry revenue.<sup>16/</sup> In Auction 66, this domination continued. As shown in Chart 3, the largest four of these five carriers accounted for 78 percent of all winning bids in Auction 66 (compared to 4 percent for all designated entities):

---

<sup>16/</sup> See Comments of Council Tree Communications, Inc., WT Docket 05-211, at 17-20 (filed Feb. 24, 2006).

**Chart 3**



---

**Notes to Chart 3:**

- (a) Winning bids as of close of Auction 66. Net winning bid is the gross winning bid less the amount of any designated entity bidding credit. Total net winning bids are \$13,700.
- (b) Top 4 national wireless carrier bidders are T-Mobile License LLC, Celco Partnership d/b/a Verizon Wireless, SpectrumCo LLC (Sprint and cable companies), and Cingular AWS, LLC.
- (c) Other non-designated entity bidders include 43 winning bidders.
- (d) There were 57 designated entity winning bidders in Auction 66.

The smallest of these dominant carriers — ALLTEL Corporation, Inc. — did not apply to participate in Auction 66. The success of the largest four national wireless carriers

only reinforces the excessive concentration of licenses that Congress sought to avoid in enacting Section 309(j) of the Communications Act, and it underscores that the Commission's designated entity rules are not serving the ends envisioned by Congress.

### **III. THE COMMISSION SHOULD LIMIT ELIGIBILITY TO BID FOR LICENSES IN CERTAIN 700 MHz BAND BLOCKS TO SMALL OR VERY SMALL BUSINESSES**

The outcome in auctions of 700 MHz Band licenses will be similar to Auction 66 — or even worse — unless the Commission acts now to help improve the ability of designated entities to become Commission licensees. To do so, the Commission should limit eligibility to bid for licenses in Lower 700 MHz Band block B and Upper 700 MHz Band block C to those that qualify as small or very small businesses under Section 27.502 or Section 27.702 (as applicable) of the Commission's Rules.<sup>17/</sup> As currently configured, the Lower 700 MHz Band block B is a 12 MHz paired block of two 6 MHz segments, the Upper 700 MHz Band block C is a 10 MHz paired block of two 5 MHz segments, and each is licensed on an economic area grouping basis.<sup>18/</sup> Setting aside this spectrum block for bidding only

---

<sup>17/</sup> Qualifying designated entities that require greater 700 MHz spectrum resources to provide a contemplated service can use the bidding credits to be offered by the Commission to compete for licenses in other 700 MHz spectrum blocks.

<sup>18/</sup> Council Tree supports the proposals to license Upper and Lower 700 MHz Band spectrum over smaller service areas that are more accessible to designated entities. See *NPRM* at ¶ 23.

by designated entities will make it far more likely that smaller businesses and new entrants will actually become 700 MHz Band licensees.

Indeed, the Commission made a similar judgment in the case of broadband PCS, where it created set-aside blocks based on the expectation that bidding credits and installment payment terms alone would not be enough for smaller businesses to overcome the substantial advantage held by large incumbents:

[I]n our judgment we do not anticipate designated entities to realize meaningful opportunities for participation in broadband PCS unless we supplement bidding credits and other special provisions with a limitation on the size of the entities designated entities will bid against. Without insulation of the entrepreneurs' block, the record strongly supports the conclusion that measures such as bidding credits will prove ineffective for broadband PCS.<sup>19/</sup>

Thus, it was the Commission's judgment that "meaningful opportunities" for smaller businesses could be had only by enforcing eligibility limitations for 40 MHz of spectrum nationwide, fully one-third of the entire broadband PCS spectrum allocation.

Here, Lower 700 MHz Band block B and Upper 700 MHz Band block C represents 36.6 percent of the 700 MHz Band spectrum that must be auctioned under the DTV Act, but just 26 percent of the Lower and Upper 700 MHz Band allocation as a whole. Creating a limitation on the size of the entities that designated entities will bid against for this spectrum will help designated entities to

---

<sup>19/</sup> *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 414-15 (1994) (emphasis added).

overcome the profound limitations that these new entrants will face in undertaking to acquire Commission licenses here, and it will also help these entities to develop business plans in advance of the forthcoming auction. For these reasons, the Commission should limit eligibility to bid for licenses in Lower 700 MHz Band block B and Upper 700 MHz Band block C to those that qualify as small or very small businesses under Section 27.502 or Section 27.702 (as applicable) of the Commission's Rules.

**IV. IN THE ALTERNATIVE, THE COMMISSION SHOULD OFFER A 35 PERCENT BIDDING CREDIT TO QUALIFYING APPLICANTS BIDDING FOR LICENSES IN ANY 700 MHZ BAND BLOCK**

Should the Commission choose not to limit eligibility to bid for licenses in Lower 700 MHz Band block B and Upper 700 MHz Band block C, Council Tree urges the Commission to undertake to improve the assistance available to designated entities by offering a new 35 percent bidding credit level in future auctions of 700 MHz Band licenses. Increasing the bidding credit offered to particularly small businesses under these circumstances would be consistent with the Commission's prior decisions to use a higher bidding credit level in the absence of other designated entity preferences.<sup>20/</sup> The Commission codified this choice in

---

<sup>20/</sup> See, e.g., *Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175, 201, 215-16 (1994) (raising bidding credit offered to businesses owned by members of minority groups and women from 25 to 40 percent to help in bidding for licenses that were not within blocks set-aside for designated entities); *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), Report*



crafting its uniform Part 1 competitive bidding rules, resolving to increase the level of the bidding credits to be set forth in its standardized schedule because of the decision to suspend the availability of installment payment financing.<sup>21/</sup> The

---

*and Order*, 12 FCC Rcd 10785, 10878-79 (1997) (raising bidding credit levels due to unavailability of installment payment financing for WCS licensees); *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd 9972, 10013 (1997) (raising bidding credit levels due to unavailability of installment payment financing for 800 MHz SMR licensees); *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5 -29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Second Order on Reconsideration*, 12 FCC Rcd 15082, 15095-96 (1997) (raising bidding credit levels due to unavailability of installment payment financing for LMDS licensees).

<sup>21/</sup> *Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 403 (1997) (“*Part 1 Third Report and Order*”). The Commission has relied on this 35 percent bidding credit to offset the absence of other designated entity incentives since adopting the schedule in 1997. See, e.g., *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd 10030, 10091 (1999) (“To balance the impact on small businesses of eliminating installment payments, we amend our rules to increase the tiered bidding credits available to paging bidders, consistent with the schedule of bidding credits adopted in the *Part 1 Third Report and Order* . . . .”); *Implementation of Competitive Bidding Rules to License Certain Rural Service Areas, Report and Order*, 17 FCC Rcd 1960, 1974 n.86 (2002) (resolving to supplement the broadband PCS bidding credit scheme with the 35 percent bidding credit for its auction of RSA cellular licenses “because smaller businesses may be interested in acquiring licenses to provide service in these markets.”).

Commission later offered a 35 percent bidding credit to qualifying smaller businesses bidding for Lower 700 MHz Band block C licenses.22/

Under its current Rules, the Commission will offer bidding credits of 15 percent and 25 percent to qualifying smaller businesses bidding for 700 MHz Band licenses to be auctioned under the DTV Act.23/ The standardized schedule of bidding credits set forth in Part 1 of the Commission's rules provides that businesses with average annual gross revenues not exceeding \$3 million are eligible for a bidding credit of 35 percent.24/

In the absence of set-aside blocks of 700 MHz Band spectrum, the Commission should offer this 35 percent bidding credit to applicants that qualify under Section 1.2110(f)(2)(i) of the Commission's Rules bidding for licenses in any 700 MHz Band block. Under the conditions currently affecting the designated entity program, providing this additional incentive is essential to help give effect to the intent of Congress.

---

22/ See 47 C.F.R. §§ 1.2110(f)(2)(i); 27.702(a)(1), (b).

23/ See *id.*, §§ 1.2110(f)(2)(ii)-(iii); 27.502; 27.702.

24/ See *id.*, § 1.2110(f)(2)(i).

## **V. CONCLUSION**

For these reasons, Council Tree urges the Commission to limit eligibility to bid for licenses in Lower 700 MHz Band block B and Upper 700 MHz Band block C to those that qualify as small or very small businesses under Section 27.502 or Section 27.702 (as applicable) of the Commission's Rules or, in the alternative, to offer a 35 percent bidding credit to applicants that qualify under Section 1.2110(f)(2)(i) of the Commission's Rules bidding for licenses in any 700 MHz Band block.

Respectfully submitted,

/s/ Steve C. Hillard  
Steve C. Hillard  
George T. Laub  
Jonathan B. Glass  
Council Tree Communications, Inc.  
2919 17th Avenue  
Suite 205  
Longmont, CO 80503  
(303) 678-1844

September 29, 2006